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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1003

FRED STARK AND JAMAICA 201 ST. CORP., INC. and JAMAICA 202 ST. CORP., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Fred Stark and Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc. (herein "Petitioner" or "Stark") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 2, 1975.

Opinions Below

The opinion of the Court of Appeals (37a) is not yet officially reported. The decision and order of the National Labor Relations Board (1a) is reported at 213 NLRB 38 (1974).

Jurisdiction

The opinion of the Court of Appeals for the Second Circuit (37a), enforcing the decision of the National Labor Relations Board (herein "Board") issued November 5, 1975. The Court thereafter entered judgment (56a) on December 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Was the Board's decision and order not justified and therefore unenforcible since it was obtained without due process of law because Stark was denied a fair trial by reason of the Administrative Law Judge's ("ALJ") out of hand refusal to sequester the alleged discriminatees, based not on the exercise of his discretion, but on the ground that it is the "Board's 'uniform practice' (43a) not to apply the rule to those persons"?

Statute Involved

The relevant provision of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. §§ 151, 160(b), is set forth below:

> "Sec. 10(b) Any such [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States . . ."

Statement of the Case

This case presents a question critical to the administration of the Act. Based on an unfair labor practice complaint issued against Stark alleging the discriminatory discharge of six (6) employees, the case was tried before an ALJ. At the outset of the hearing Stark moved to sequester all witnesses including the six (6) alleged discriminatees "because in this case there will be a very sharp issue of credibility involved" (42a). The ALJ, out of hand, without exercising any discretion on his part, denied sequestration since in his view "[t]he Board's uniform practice has been not to apply the rule to those persons" (43a).

The ALJ in his decision stated that "the case revolves substantially around credibility resolutions" (41a) and thereupon promptly decided all issues of credibility against Stark. The Board in upholding the ALJ's credibility findings followed its "established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect" (42a).

The Court below stated it will not upset the ALJ's credibility findings if "correct procedures have been followed in making the credibility findings" (42a).

The Court of Appeals stated that if this had "been a court trial involving ordinary witnesses, it would have constituted a classic case for sequestration" (43a) and that the "failure to have exercised that discretion in favor of sequestration would have been an abuse of discretion" (52a).

The Court of Appeals emphasized that the effect of failure to sequester the discriminatee witnesses was heightened by the ALJ's "novel view" of his geometrical

proportion formula for determining credibility when he said:

> "If there was fabrication, it would seem more probable that it was the one (i.e. Stark), rather than the four (i.e. discriminatees), who was lying. It is, of course, possible that the testimony of four can be contrived, and that of one truthful; however, the likelihood of perjury or mistake becomes more remote in direct, or even geometrical, proportion to the number of persons who testify to a fact." (45a n. 2a)

The Court of Appeals stated that although the ALJ had abused his discretion in refusing to apply "the rule," Stark was not entitled "to a remand—much less to the denial of enforcement . . ." (53a).

The ALJ made credibility findings after having denied Stark the opportunity for a full and fair disclosure of all the facts. Accordingly, his decision and the Board's order were obtained without due process of law.

Reasons for Granting the Writ

1. The Board's order should not have been enforced because it was obtained without due process of law. Stark was denied the opportunity for a full and fair disclosure of the facts.

The case before the Board depended on the resolution of very sharp critical issues of credibility. In order to present a full and fair disclosure of the facts Stark moved to sequester all witnesses including discriminatee witnesses. The ALJ out of hand refused to do so because in his view it is the Board's long established firm policy not to do so. This ruling prevented Stark from making a full and fair record upon which the critical credibility issues could be determined.

This case constitutes "a classic case for sequestration—a principle whose lineage is traced back to Daniel's effective cross-examination of the elders who traduced Susana, see 6 *Wigmore, Evidence* § 1837 at 347-48 (3d Ed. 1940), and whose high standing in the law of evidence is attested by the quaint practice of referring to it simply as 'the rule' " (43a).

"The rule" is a simple and time tested method for helping to discover the truth and is an evidentiary doctrine which courts, under § 10(b) of the Act, should enforce upon the Board. The court below reviewed the amendments, over the years, to the Act, and concluded that it is for the judiciary to determine how closely Board proceedings must conform to the procedures in the district courts. (45a) The Court have ruled that "the rule" should be applied to Board hearings. *N.L.R.B.* v. *Quality & Service Laundry, Inc.*, 131 F.2d 182, 183 (4 Cir. 1942) *cert. denied*, 318 U.S. 775 (1943); *N.L.R.B.* v. *Burke Machine Tool Co.*, 133 F.2d 618, 621 (6 Cir. 1943). The Board, however, has refused to apply the rule to alleged discriminatees. *Jacques Power Saw Co.*, 85 NLRB 440, 443 (1949); *Donald Trettenero*, 129 NLRB 619 n.1 (1960).

The Court below ruled that the ALJ should have had authority to apply "the rule" to discriminatees because the interest of the General Counsel of the Board should be—not that he "shall win a case, but that justice shall be done. *Berger* v. *United States*, 295 U.S. 78, 88 (1935)". (50a) Beyond that, the judicial decisions that have developed the "party" exception scarcely took into consideration the situation that frequently occurs in § 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) proceedings where several employees may be testifying to a single event on one side (as in our case), whereas the other side is presented by a single witness (as in our case).

The Court below, although finding the refusal to sequester to be an abuse of discretion because the ALJ

felt he had no authority to apply "the rule", nevertheless enforced the Board's order. The ALJ's refusal to sequester was reversible error.

". . . [W]e have had, do have and will continue to have an adversary system designed to arrive at the legal truth. In such a system, the quality of justice dispensed . . . is dependent upon a record being made wherein credibility of witnesses may be properly tested". (Judge Kaufman, "Does a Judge Have A Right To Qualified Counsel," N.Y.L.J. March 27, 1975, p. 5, column 1).

"Due to this high degree of required scrutiny which enables the court of appeals to delve deeply into the evidence and their power to reject findings of fact and modify the NLRB decision and findings accordingly," of course . . . "before a determination of fact will be considered conclusive, the parties must have been afforded an opportunity for a full and fair disclosure of the facts." 27 No. 1, Administrative Law Review, Section of Administrative Law, ABA, Winter 1975, p. 96.

The ALJ, out of hand, without exercising any discretion on his part, did not apply "the rule" because it is the Board's uniform practice not to apply the rule to alleged discriminatees. His refusal to do so constituted error that could not have failed to prejudice Stark.

We submit that in arriving at the truth the ALJ should have applied the "rule."

Due process mandates that the Petitioner's request for the sequestration of witnesses should have been granted. The failure so to do resulted in a denial of a fair trial to the Petitioner.

> "Justice under law is, of course, the ultimate goal . . ." (*N.L.R.B.* v. *Rex Disposables,* 491 F.2d 588, 591 [5 Cir. 1974]).

The position that it is a long established uniform Board policy that alleged discriminatees can never be seques-

tered denies Stark the opportunity for a full and fair disclosure of the facts, thereby resulting in the denial of a fair hearing.

Not only did the ALJ deny sequestration but in his decision he relied strongly on the novel theory that if there was fabrication, it seems more probably that it was the one witness (Stark) rather than the four discriminatees who were lying, because "the likelihood of perjury or mistake becomes more remote in direct or geometrical proportion to the number of witnesses who testify to a fact". "With deference we cannot feel the force of this reasoning." (*N.L.R.B.* v. *James Thompson & Co.*, 208 F.2d 743, 746 [2 Cir. 1953]). While a party is entitled to call as many witnesses as he may deem necessary to establish his claim or defense, . . . it is erroneous to suppose that an issue is to be determined by a count of witnesses and reference to numerical superiority . . . Witnesses are not counted; their testimony is weighed . . ." (*4 Jones on Evidence,* 6th Ed. 306-307).

We submit that the denial of sequestration deprived Stark of a fair hearing. In one breath the Board says the Judge must follow (and he did) its hard and fast rule of no sequestration of alleged discriminatees, and in another breath, it says that "It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility . . . (*Standard Dry Wall Products, Inc.*, 91 NLRB 544 [1950])." This Board policy overlooks the fact that: "[T]he Examiner . . . sees the witnesses and hears them testify, while the Board and the reviewing court looks only at cold records." (*NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 [1962]).

"The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion." *4 Jones on Evidence,* 6th Ed. 543. See also *6 Wigmore, Evidence* sections 1837-1838. (3d Ed. 1940).

Rule 615 of the new Federal Rules of Evidence makes sequestration a matter of right rather than one of discretion. *4 Jones on Evidence* 6th Edition 543 (Advisory Committee's Note).

So far as practicable, Board hearings are to be conducted in accordance with the rules of evidence applicable in the federal district courts. Sec. 10(b) of the Act "clearly relates to the introduction of evidence before the Board." (*NLRB* v. *Interboro Contractors Inc.*, 432 F.2d 854, 859 (2 Cir. 1970). While the Act commits to the Board the power and responsibility of determining the facts as revealed by the record, how can the Board intelligently exercise such power and responsibility if it enforces a fixed rule of no sequestration of alleged discriminatees? The enforcement of such a rule denies to Stark the most effective tool "of discouraging and exposing fabrication, inaccuracy and collusion". *Jones, supra.*

Stark having been denied the opportunity for a full and fair disclosure of the facts before the Board made its order, the court is not obliged to enforce it.

While the Board may adopt its own rules, it exceeds the authority under the Act and acts arbitrarily when it enforces an inflexible rule. *NLRB* v. *Vapor Blast Manufacturing Co.*, 287 F.2d 402 (7 Cir. 1961). The Board's arbitrary and unilateral refusal to permit any sequestration of alleged discriminatees has deprived Stark of an opportunity for a full and fair disclosure of the facts. The Board's determination not to permit sequestration of alleged discriminatees exceeds its authority and is contrary to the provisions of Sec. 10(b) of the Act. Because of such a rule, the record made before the ALJ is one-sided in favor of the Board. The record naturally preponderates in the Board's favor when it denies the opportunity of discouraging and exposing fabrication and collusion by absolutely refusing sequestration of alleged discriminatees.

Since the courts must determine whether substantial evidence on the record as a whole supports the Board's decision and in making such a determination the courts must review all the evidence and not only that which supports the Board's decision, before such determination can be made Stark must have been afforded an opportunity for a full and fair disclosure of the facts. Such opportunity was not afforded.

Courts should not enforce Board orders impregnated with a hearing not comporting with the standards of fairness inherent in procedural due process of law. The exclusion of witnesses during trial is a time-honored practice designed to prevent the shaping of testimony by hearing what other witnesses say. *6 Wigmore, Evidence,* § 1837-39 (3d Ed. 1940).

An order of the Board, even if otherwise justified by the facts, is not just if obtained without due process of law. Due process requirements forbid the Board to use evidence that foreclosed Stark from properly attacking the credibility of the witnesses. *Bowman Transp. Inc.* v. *Arkansas-Best Freight* —— U.S. —— 95 S.Ct. 438 (1974). " 'The fundamental requisite of due process of law' is the opportunity to be heard.' *Grammis* v. *Ordean,* 234 U.S. 385, 384 (1914). The hearing must be '. . . in a meaningful manner.' *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965)." *Goldberg* v. *Kelley,* 397 U.S. 254, 267 (1970).

2. The decision below is inconsistent with the 6th Circuit's decision. This Court should resolve this inconsistency. It is important in the administration of the Act.

The court below although finding that the ALJ when he had refused to exercise any discretion in applying "the rule" had abused his discretion and further that a failure to exercise that discretion in favor of sequestration would have been an abuse of discretion, nevertheless enforced

the Board's order. In *N.L.R.B.* v. *Prettyman,* 117 F.2d 786 (6th Cir. 1941), the 6th Circuit refused to enforce a Board order, even if justified by the facts, since such a Board order is not just if obtained without due process of law. In denying enforcement without prejudice to a new hearing the court said at pp. 791-792:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"
>
> "Congress has given the Board the authority to administer the National Labor Relations Act, subject to the supervisory power of the Court of Appeals and the court must act within the bounds of the statute, without intruding upon the administrative province, but it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. Ford Motor Company v. National Labor Relations Board, 305 U.S. 364, 373, 59 S.Ct. 301, 83 L.Ed. 221. The court is not compelled to enforce an order of the Board which is impregnated with a hearing not comporting with the standards of fairness inherent in procedural due process. So scrupulous are our courts to maintain the supremacy of the ordinary law in cases where officers of the Government itself are concerned, they will not permit the Government to profit in any way by wrongs

which its officers have committed. Silverthorn Lumber Company v. United States, 251 U.S. 385, 391, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426.

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority.

* * * *

"Even if the order of the Board were justified by the facts, which we are not here deciding, the necessity of according due process of law to the respondents is not obviated. No order is just if obtained without due process of law . . ."

Courts should not enforce an order of the Board which is impregnated with a hearing not comporting with the standards of fairness inherent in procedural due process.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Decision and Order of the NLRB.

JKP

213 NLRB No. 38

D—9067
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED STARK AND JAMAICA 201 ST. CORP., INC. AND JAMAICA 202 ST. CORP., INC.

and

LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Cases 29—CA—3600 and
29—CA—3601

On May 31, 1974, Administrative Law Judge Charles W. Schneider issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National

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[1] The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified, and hereby orders that Respondents, Fred Stark and Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc., New York, New York, their partners, officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Substitute the following paragraph for paragraph 2(a):

"(a) Offer Charles Thompson, Roger Evans, Wayne Huff, Jeffrey Maksymchak, Felipe Ortiz, and George Peters immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges."

2. Delete paragraph 2(b) and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. SEP 6 1974

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge, or refuse to reinstate or rehire employees, or subject them to demeaning conditions of employment, because they join, support, assist, or affiliate with Local 32B, Service Employees International Union, AFL-CIO, or any other union, or because they sign cards for, or otherwise designate or select, such Union or any other union as their bargaining representative.

WE WILL NOT question employees about their union activity, affiliations, assistance, or support, or about their selection of the Union or any other union.

WE WILL NOT threaten employees with discharge or other reprisals in employment if they assist, support, or join a union, or select a union as their bargaining representative.

WE WILL offer Charles Thompson, Roger Evans, Wayne Huff, Jeffrey Maksymchak, Felipe Ortiz, and George Peters immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and we will pay them for any losses sustained as a result of their discharges, with 6-percent interest.

FRED STARK AND JAMAICA 201 ST. CORP., INC. AND JAMAICA 202 ST. CORP., INC.
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212—596—3535.

Decision of the Administrative Law Judge.

JD-371-74
Brooklyn, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

FRED STARK AND JAMAICA 201 ST. CORP., INC. AND JAMAICA 202 ST. CORP., INC.

and

LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Case Nos. 29-CA-3600
29-CA-3601

Elizabeth K. Johnson, Esq., for the General Counsel.
Charles Katz, Esq., New York, N.Y., for the Respondent.

DECISION

Statement of the Case

CHARLES W. SCHNEIDER, Administrative Law Judge: On October 18, 1973, Local 32B, Service Employees International Union, AFL-CIO, the Union, filed unfair labor practice charges against Fred Stark, Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc., herein collectively referred to as the Respondent, alleging commission by the Respondent of unfair labor practices in violation of the National Labor Relations Act (29 U.S.C. 151 et seq.). On December 28, 1973, the Regional Director issued an Order

Consolidating the cases, accompanied by a Complaint and Notice of Hearing. Service of the charges, the Order, and the Complaint and Notice of Hearing was duly made on the Respondent and the Union.

The Complaint alleged in sum that the Respondent, in violation of Section 8(a)(1) and (3) of the Act, discharged a number of employees, identified hereafter, interrogated employees concerning union matters, and warned employees against affiliating with or supporting the Union. The Respondent duly filed its answer, thereafter amended, denying the commission of unfair labor practices.

Pursuant to notice a hearing was held in Brooklyn, New York on March 12, 13 and 19, 1974. The General Counsel and the Respondent appeared and were represented by counsel. All parties were afforded full opportunity to be heard, to introduce material evidence, to present oral argument, and to file briefs. Briefs were filed by the General Counsel and the Respondent on April 29, 1974, and have been considered.

Upon consideration of the entire record and the briefs, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

Stark is a copartnership composed of Fred Stark, Harold Stark and Rita Stark, copartners, doing business under the trade name and style of Fred Stark.

Jamaica 201 is and has been at all times material herein a corporation duly organized under, andexisting by virtue of, the laws of the State of New York.

Jamaica 202 is and has been at all times material herein a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

At all times material herein Stark has maintained its principal office and place of business at 198-10 Jamaica Avenue in the City of New York and State of New York where it is, and has been at all times material herein, engaged in the ownership and rental of commercial and residential buildings and properties.

At all times material herein Jamaica 201 and Jamaica 202 have maintained their principal offices and places of business at 198-10 Jamaica Avenue, in the City of New York, and State of New York where they are, and have been at all times material herein, engaged in the rental of residential real estate.

Stark, Jamaica 201 and Jamaica 202, herein collectively referred to as the Respondent, are, and at all times material herein have been, affiliated businesses with common officers, ownership, directors and operators, and constitute a single integrated business enterprise; the said directors and operators formulate and administer a common labor policy for the aforenamed concerns, affecting the employees of said concerns.

During the past year, which period is representative of its annual operations generally, the Respondent in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business, oil and other goods and materials valued in excess of $50,000 of which goods and materials valued in excess of $50,000 were transported and delivered to it, and received from, other enterprises located in the State of New York, each of which other enterprises had received the said goods and materials in interstate commerce directly from states of the United States other than the state in which it is located.

During the same period, the Respondent received rental revenue from residential properties in excess of $500,000 and rental revenue from commercial properties in excess of $100,000. Said rental revenue from commercial properties included rent of at least $25,000 from enterprises which annually purchase goods valued in excess of $50,000 from sources located outside the State of New York.

Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Local 32B, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Summary

On April 30, 1973, seven of the Respondent's employees signed authorization cards for the Union. On May 10, 1973, the Respondent received a letter from the Union requesting recognition. Within a week thereafter the employment of 6 of the 7 employees was terminated. The General Counsel contends that the terminations were for union activity; the Respondent contends that two of the terminations were voluntary quittings and that the remainder were for cause.

The Designations of the Union

On April 17, 1973, the Respondent signed a contract with the Union covering one of the Respondent's properties not

involved here. Upon learing of this, George Peters, a foreman for the Respondent, contacted the Union and arranged for an organizational meeting at his apartment.

The meeting was held on April 30, 1973. It was attended by Peters, and by employees Charles Thompson, Jeffrey Maksymchak, Roger Evans, Wayne Huff, Kenroy Bishop, and Felipe Ortiz. The Union was represented by Tony Poccio, an organizer. Each of the seven employees signed an authorization card at the meeting. The Union thereafter requested recognition by letter dated May 8, which the Respondent received on May 10, 1973.

On the following day May 11, 1973, the employment of Thompson, Evans, Huff, and Maksymchak was terminated.

At some unidentified date after receiving the Union's letter, Fred Stark, one of the Respondents, telephoned Rudolph Larmond, an official of the Union, and asked what it was "all about." Advised by Larmond that the Union wished to represent the employees and would like to negotiate, Stark replied that there must be "some mistake" and asked who the people were. Larmond gave Stark two or three names, to which Stark replied: "Oh, I fired them. They're all drunk, and I fired them."

Larmond's testimony, which is not denied, is credited.[1]

On May 16 Felipe Ortiz was terminated. And on the following day, May 17, George Peters was discharged.

Contentions

The General Counsel contends that the six employees were discharged for their union activity. The Respondent

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[1] The Regional Director subsequently dismissed a refusal to bargain charge filed by the Union, on the ground that the Union did not represent a majority of the employees.

contends that Thompson quit, that Evans and Huff were discharged for drunkenness, and Maksymchak for refusing to work. The Respondent asserts that Ortiz was not discharged but quit. With respect to Peters, the Respondent's contention is twofold: That Peters is a supervisor and not an employee under the Act, and that he was discharged for falsifying the reason he took a day off.

In essential particulars resolution of the issues is substantially dependent upon credibility determinations.

The terminations of Thompson, Evans, Huff and Maksymchak

On May 11, 1973, Harold Stark, an official of the Company, and the son of Respondent Fred Stark, directed Charles Thompson to take a crew consisting of Evans and Huff to a building in the process of renovation, remove debris from the structure, and haul it away in the Respondent's truck.[2]

During the morning the employees completed the work of cleaning up the first floor of the building and began work in the basement. That, however, was a more difficult job involving, among other things, the hauling of wet debris, including ashes, in 5 or 10-gallon pails, lugging them a considerable distance across the basement, up the stairs, and out to the truck. In the past in similar situations 5 or 6 men had been assigned to form a chain to perform the work. During or shortly after the lunch

[2] Except as otherwise indicated the findings herein are based on uncontradicted and credited testimony. Where there is significant conflict on material facts credibility resolutions are made. Collateral occurrences which were the subject of testimony, but do not directly bear on the issues, have been omitted from the recital of facts.

hour, Thompson suggested that more men were needed for the job. The others agreed. The three thereupon drove to the office of the Respondent some short distance away for the purpose of asking Harold Stark to provide more help.

They arrived at the office about 1 or shortly thereafter. When they arrived Thompson went inside, for the purpose, according to the testimony of the employees, to find Harold Stark. Stark was not in the office. The 3 employees then sat in the truck to await his arrival. While there they were joined by Maksymchak, a part-time student-employee, who was just reporting for work. Maksymchak was told by Stark's secretary to await the arrival of Helga Schenck, the Respondent's office manager. Miss Schenck was at that time at lunch and had left word that when Maksymchak arrived he should wait for her because she had an errand for him to do.

Thompson, Evans and Huff joined Maksymchak in the latter's station wagon to await the arrival of Harold Stark. While they were waiting, Maksymchak said that he was not feeling well, and did not think that he would work that day. Under the arrangement with the Respondent, Maksymchak's schedule was flexible, and he was not required to work regularly.[3]

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[3] The testimony of Stark's secretary, Karen Gsell, is that when Thompson came into the office Maksymchak was already there waiting for Miss Schenck, that Thompson said that he had quit, and told Mayksymchak that he wished to see him outside, and that the two then left.

Thompson denied saying that he had quit. The testimony of the employees, including Maksymchak, is that when Maksymchak arrived at the office, Thompson, Evans and Huff were sitting in the truck, waiting for Harold Stark to arrive.

In view of the whole pattern of events, and the subsequent occurrences, I conclude that Ms. Gsell misunderstood Thompson. It is not apparent, and no reason is suggested, why he should have quit, or waited with the others if he had. Cf. footnote 5.

Decision of the Administrative Law Judge.

Sometime after one o'clock Helga Schenck returned from lunch. According to her testimony she went out to the car, and asked the 4 employees whether that was all they had to do, and Thompson replied that he was not going to work any more. She then went back into the office, apparently without speaking to Maksymchak, though that had been her primary purpose in coming out.

A short while later Harold Stark arrived and approached the car. According to the testimony of the 4 employees, Stark asked Maksymchak whether he was going to work that day, Maksymchak responding in the negative, stating that he did not feel like working. Harold Stark looked at the others and said that they were discharged for being drunk.

Stark's version of the incident is as follows: All but Maksymchak were drunk. He asked the 4 men what they were doing there and why they hadn't finished the job. Thompson replied that they were not doing the work, Huff that they were done with it. Being unable to get anything more coherent from Thompson, Evans, and Huff because of their drunken condition, Stark told those three that they were drunk, had not done the work, and were fired. As to Maksymchak, Stark asked him whether he was going to work or stay there. Receiving no response, Stark said that if Maksymchak did not want to come to work, he was fired too. He then walked away.

All four employees denied that they were drunk. All testified that they had not had anything to drink that day. Admittedly they did not deny Harold Stark's accusation: Their testimony as to that is that they had no opportunity, that after discharging them, Stark immediately walked away.

Credibility resolutions as to this incident are made hereafter.

Decision of the Administrative Law Judge.

Maksymchak's requests for reinstatement

Maksymchak testified that on the day after the discharge he returned to the Respondent and asked Harold Stark for his job back. According to Maksymchak, Harold Stark told him to wait a few weeks "till things cool off." Over the next several months Maksymchak returned 4 or 5 times without success. On the first occasion Harold Stark asked Maksymchak why he joined the Union, and characterized Maksymchak's action "like stabbing me in the back." On a later occasion Stark told Maksymchak that he could have his job back if he got out of the Union. Maksymchak said that he would not do that, and thereafter ceased coming back.

Maksymchak's testimony concerning his requests for reinstatement is not denied. I do not consider Harold Stark's general testimony to the effect that he did not "discuss" the Union with employees to constitute a denial of Maksymchak's testimony as to his reinstatement requests. Credibility findings as to the incidents are made hereafter.

Evans' request for reinstatement

On the Monday following the discharges, when Roger Evans returned to the Respondent's to get his pay, he asked Harold Stark whether Stark could not give him and Thompson another chance. Harold Stark's testimony is that he said no—"that is the last chance you had."

The May 14 conversation between George Peters and Fred Stark

On Monday, May 14, 1973, Fred Stark and Harold Stark came to a job site at 145th St. and Jamaica Avenue. According to the testimony of George Peters, while Harold

Stark was inside the building, Fred Stark called Peters aside outside the building, and told Peters that he had just fired four of Peters' men because they had joined the Union, naming them. Fred Stark then said to Peters, "I'm surprised at you, Mr. Peters, you're supposed to be my foreman, you know, you're not supposed to be joining a union . . . you stabbed me in the back." Fred Stark went on to say, however, that he would "forget all about it," that Peters could go back to work "and just stay away from the union." Peters' testimony is that he said that he would think about it.

Harold Stark admitted being at the location with his father on the day in question, but denied that such a conversation, or any conversation between his father and Peters, took place, terming it "impossible," because he was with his father during the entire time they were at the premises. Peters' testimony is that it was "impossible" for Harold Stark to have heard the conversation, because Harold was inside the building at the time. Fred Stark did not testify, though present in the hearing room throughout the hearing. The conflict is resolved at a later point.

The termination of Ortiz

Felipe Ortiz was a porter in one of the Respondent's apartment buildings, in which George Peters and his wife Marie lived. Ortiz' job was to keep the public portions of the interior of the building clean, and also the exterior, including the grounds. Ortiz was terminated on May 16, 1973, according to the General Counsel, because he refused to pick up dog manure on the grounds with his hands as ordered by Harold Stark. According to the Respondent, Ortiz quit rather than clean up the outside of the building.

Ortiz is primarily literate in the Spanish language. My estimate, from observation of him as a witness, is that he

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has small command of the English language. In addition he is affected with a severe physical speech handicap. I found him of such minimal intelligibility in the English language as to require the services of a Spanish interpreter. Because of the speech handicap, however, the interpreter also had difficulty with substantial portions of Ortiz' testimony, a material part of which he found untranslateable.

Ortiz' testimony to the effect that Harold Stark ordered him to pick the dogs' droppings with his hands was corroborated by Mrs. Marie Peters and by employee Kenroy Bishop. Both testified, consistently with Ortiz, that Mrs. Peters and Ortiz protested that Ortiz should be allowed to get a shovel and broom from the basement but that Harold Stark insisted that Ortiz pick up the droppings with his hands. When Ortiz refused, Stark told him that if he would not do it, to go home.

Harold Stark denied that he ordered Ortiz to pick up the dog droppings with his hands. His testimony is that Ortiz refused to clean out litter, including dog manure, from several bushes on the grounds, claiming that 'hat was not his job. Harold Stark's testimony was corroborated by Lawrence Moultrie, an employee.

Credibility resolutions are made hereafter.

May 17, 1973

1. The discharge of George Peters

On Tuesday, May 15, 1973, after work, George Peters told Fred Stark that he would not be in the next day. When Fred Stark asked him why, Peters replied that he had been spitting blood and that he was going to the Veteran's Administration Hospital.[4] According to Peters, Fred

[4] Peters' undisputed testimony is that he had this condition as a consequence of an on-the-job injury incurred in the employment of the Respondent about December 1971.

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Stark told him to "make sure you stay away from the Union."

Peters' statement to Fred Stark was untrue. The real reason he took off on May 16 was to take Charles Thompson, Roger Evans, Wayne Huff, and Jeffrey Maksymchak to the Union, where they gave affidavits concerning their discharges. Peters' testimony is that he did not tell Fred Stark the truth because of the warning he had previouly received from Stark concerning the Union.

On May 16, in the morning, Peters took the discharged quartet to the Union headquarters in his car. They were apparently observed by someone who reported the matter to Fred Stark.

On the following morning when Peters reported at the office he was discharged by Fred Stark. According to Peters, Fred Stark said to him: "I see you went to the Union again yesterday. I told you to stay from the Union . . . evidentally, [sic] Mr. Peters, you don't learn . . . you're fired. Give me all your keys."

Fred Stark did not testify as to the discharge of Peters. Harold Stark testified that he was in the office at the time. He denied Peters' version of the incident. Harold Stark's testimony on direct examination as to the incident is as follows:

> Q. What happened when Peters came in?
> A. Well, he walked in and then my father told him, he says, "You are a liar and I don't trust you. You weren't at the VA Hospital when you said you were."
>
> He says, "You are fired" and let him go. That is when he walked in.
> Q. Did Peters say anything?
> A. He didn't say anything. He just walked around and walked out.

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Harold Stark also denied Peters' testimony that Fred Stark made the statements about the Union in the discharge interview, to which Peters had testified.

Credibility findings are made hereafter.

2. Harold Stark's statements to Kenroy Bishop

On the same morning, shortly after Peters' discharge, according to the testimony of Kenroy Bishop, Harold Stark spoke to him about the Union.

Bishop's testimony is that Harold Stark took him into the back of the office and told him that he must "give up on the union, because it won't come here." According to Bishop, Stark further said that "he had already fired everybody who had signed for the union, except me." Bishop testified that Harold Stark also said that he had just fired Peters, but did not say why, or indicate that it was because of the union.

Either on that occasion, or later in the day, according to Bishop, Harold Stark told him that "the Union is no good . . . they're going to mess this place up."

Harold Stark testified that he did not "discuss" the Union with employees. However, he did not specifically deny or refer to these conversations in his testimony. Credibility resolutions as to them are made hereafter.

Credibility Resolutions and Conclusions

As is apparent from the foregoing recital, the case revolves substantially around credibility resolutions. If the substance of the General Counsel's testimony is accepted

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the complaint is substantiated. If the substance of the testimony of the Respondent is accepted the complaint falls. It seems apparent that, in a number of instances, there must be deliberate falsification of testimony by one side or the other. It is not possible that there could be honest misunderstanding with respect to some of the incidents.

Both the General Counsel and the Respondent insist upon the credibility of their witnesses and the incredibility of the opposing testimony. The Respondent's brief is devoted almost wholly to an attack upon the credibility of the General Counsel's witnesses. To this end counsel for the Respondent has painstakingly analyzed all the evidence of the witnesses and has pointed out various inconsistencies in the testimony of the witnesses for the General Counsel. These exist, but so do inconsistencies in the testimony of the Respondent's witnesses. In arriving at the findings herein I have taken into consideration the fact that the Respondent had previously entered into a collective-bargaining contract with the Union covering another segment of the Respondent's operations.

In determining who is to be believed, certain background and objective factors must be considered. Thus, we begin with the fact that on the day after the Respondent received the letter from the Union advising the Respondent of the Union's claim to recognition, four of the seven employees who had designated the Union were terminated. And within 6 days thereafter two more were terminated. Coincidence, of course, is not a substitute for proof, but neither may it be ignored in determining the existence of proof.

Also, some of the General Counsel's evidence and testimoney indicative of opposition by the Respondent to the

Union is not specifically denied. As has been seen, Harold Stark told Kenroy Bishop that he had fired everybody who had signed for the Union except Bishop, and that the Union was no good and would mess the place up. The Respondent attacks Bishop's testimony as a deliberate lie. However, it has been noted that, although Harold Stark testified in general terms that he did not discuss the Union with employees, he did not specifically deny Bishop's testimony as to these statements. I do not find persuasive the supposition that the only remaining member of the group which had signed union cards who had not been discharged, and who at the time of his testimony was still in the Respondent's employ, would deliberately fabricate testimony against the Respondent. In addition it is to be noted that Bishop's testimony does not attribute to Harold Stark a declaration that Stark had fired the employees for union activity. I think it a fair inference that if Bishop were deliberately lying he would have added that admission by Stark. These factors appear to me confirmative of my conclusion, based on observation of Bishop's demeanor, that Bishop is a credible witness.

It will also be recalled that Maksymchak testified that after repeated efforts to have Harold Stark rehire him, Stark finally told him that he could have his job back if he got out of the Union. This testimony is also not specifically denied. In the light of that fact, and the further fact that the Respondent offered no explanation for its failure to rehire Maksymchak, and from my observation of the witnesses, I credit Maksymchak's testimony in that regard.

In addition, in a number of important instances Harold Stark's testimony is not corroborated, though it was within the Respondent's power to do so. Thus, Fred Stark was not called as a witness, though present in the hearing room throughout the hearing. No explanation is advanced for

this omission. In the incidents involving George Peters and Fred Stark, all disputed, the Respondent relies solely on the testimony of Harold Stark.

The Respondent, citing *N.L.R.B.* v. *Century Broadcasting Co.*, 419 F. 2d 771, 776-77 (8th Cir. 1969), appears to contend that no adverse inference can be drawn from its failure to call Fred Stark. It is true, as the Court held in the *Century Broadcasting* case, that the failure of a respondent to present evidence has no effect on the burden of proof, and no inferences of wrongdoing can be drawn from the Respondent's failure to disclaim the Board's allegations. However, where the General Counsel presents evidence which, if accepted, establishes a material fact, the failure of a respondent to produce evidence, including testimony, in its possession or control with respect to the existence or nonexistence of the fact, is a relevant consideration in determining whether to find the fact. See *Goodyear Tire & Rubber Company,* 190 NLRB 84, 86, fn. 3; *N.L.R.B.* v. *Monumental Life Insurance Company,* 162 F. 2d 340, 343 (6th Cir. 1947). The *Century Broadcasting* case is not contrary authority in that regard. The issue there was simply whether, in the absence of any evidence by the General Counsel to establish the existence of company knowledge of union activities, the Board could properly find that the Respondent's failure to introduce evidence denying such knowledge, warranted an inference that the knowledge existed. No such situation is presented here. In each instance where significance has been found in the Respondent's failure to present evidence in its possession respecting a material issue, there is evidence in the record which, if accepted, establishes the existence of the fact found.

We turn then to the particular incidents which are in dispute.

The May 11 terminations

Here, too, the dispositive issue is which is the correct testimony, or which more closely approximates the facts: the General Counsel's or the Respondent's? The Respondent's position is that the General Counsel's witnesses lied.

We begin with the contentions: The General Counsel's is that Thompson, Evans, and Huff were awaiting the arrival of Harold Stark in order to get help on the job, that Maksymchak, because he was not feeling well, had tentatively decided not to work that day, and that none of the employees had had anything to drink. The Respondent's contention is that Thompson quit, that Evans and Huff were discharged for being drunk, and Maksymchak discharged for refusing to work.[5]

The Respondent's contention to the effect that Thompson quit is apparently based on the testimony of Karen Gsell, which was referred to in footnote 3, *supra*. As indicated there, I have concluded from all the circumstances that she misunderstood Thompson. I therefore find that Thompson was discharged.[6]

Harold Stark's testimony to the effect that Thompson, Evans and Huff were drunk, and that of the employees to

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[5] In oral argument the Respondent suggested that the quartet were refusing to work in order to compel the Respondent to recognize the Union. If that were so, the employees' action would have constituted a strike. Under ordinary circumstances, various exceptions aside, a strike for recognition is a protected concerted activity, and discharges therefore would constitute unfair labor practices. However, there is no evidence here suggesting such a strike. The Respondent does not contend that it discharged any of the employees for that reason. There is therefore no need to consider that question.

[6] The Respondent's answer, which originally admitted the discharge of Thompson, was amended at the hearing to allege that he quit.

the effect that they had had nothing to drink that day, thus collide head-on—the uncorroborated testimony of Stark against the mutually supportive testimony of the 4 employees.

If there was fabrication, it would seem more probable that it was the one, rather than the four, who was lying. It is, of course, possible that the testimony of four can be contrived, and that of one truthful; however the likelihood of perjury or mistake becomes more remote in direct, or even geometrical, proportion to the number of persons who testify to a fact.

Furthermore it is of significance that during the same period of time, two others of the Respondent's witnesses, Karen Gsell and Helga Schenck, had occasion to talk to or to observe one or all of the four. Neither testified that any of them were drunk or gave evidence of drinking. Indeed Helga Schenck specifically disclaimed any such assertion. In these circumstances it appears to me that the objective factors are supportive of my conclusion based on observation of the witnesses, that the testimony of the four employees is to be accepted and that of Harold Stark rejected.

In that connection I have not overlooked the fact that Roger Evans had on an occasion in the past been sent home for drinking and given his job back on condition that he no longer drink on the job. Nor the Respondent's undenied evidence that Huff in the past had been drinking on the job. There is no evidence however that any such, or other, complaint had ever been made concerning Thompson. I have also taken into consideration the fact that Harold Stark had spoken to employees generally, though admittedly to no one in particular, warning them about drinking on the job. I think it not without significance in this respect that when Roger Evans applied for reinstatement on behalf of himself and Thompson he was told by Harold

Stark that they had had their "last chance." Clearly Thompson had had no last chance. Nor had Maksymchak. For so far as the contentions and the evidence reveals, Maksymchak had never theretofore given the Respondent any cause for dissatisfaction.

In other instances, related hereafter, I find myself unable to accept the testimony of Harold Stark where denied by other witnesses. On the basis of my judgment as to the credibility of the witnesses, and in the light of the objective circumstances, I am unable to accept Harold Stark's testimony as to the May 11 terminations. I accept as substantially correct the testimony of the General Counsel's witnesses in that respect. To be sure, that testimony sometimes varies as to detail, but such fact, rather than detracting from credibility, appears to refute the suggestion that the stories were contrived, or rehearsed.

The discharge of Ortiz

The incident involving the termination of Ortiz is also a credibility problem. The simple factual issue is whether, as Ortiz, Mrs. Peters, and Kenroy Bishop testified, Harold Stark ordered Ortiz to pick up the dog droppings with his hands rather than permitting him to get a broom and shovel, or whether, as Harold Stark and Lawrence Moultrie testified, Ortiz refused to clean out the bushes, claiming that it was not his job.

In view of Ortiz' limited English, and his speech handicap, it might have been possible, but for two facts, to conclude that the whole business involved a simple misunderstanding—on Ortiz' part as to what he understood Harold Stark to be directing him to do, and on Harold Stark's part as to what he understood Ortiz to be refusing to do. However, I deem this not possible for two reasons,

(1), the conflicting testimony of Stark, Moultrie, Mrs. Peters, and Bishop, all literate in English, as to what Stark directed, and (2) the unexplained failure of the Respondent to offer Ortiz his job back. In addition to any conclusion based upon observation of the witnesses, I deem the latter circumstance of significance in determining the facts of the incident.

If the Respondent's testimony as to the incident is true, the Respondent may have been aware within 5 weeks thereafter that Ortiz had misunderstood what Harold Stark had been directing him to do. For on June 25, 1973, a hearing was held before an unemployment insurance referee of the State of New York on Ortiz' claim for unemployment compensation. The referee found that Ortiz had refused to clean up the front of the building, though provided with equipment, such as brooms, pails and shovels. He was therefore denied compensation on the ground that he had refused to carry out the legitimate orders of his employer. Ortiz' testimony before the referee was presumably no different than that before me—if it was intelligible—but the referee accepted the testimony of the Respondent.[7]

In any event, at the instant hearing the Respondent was unquestionably made aware of Ortiz' asserted understanding of Harold Stark's order. The Respondent was thus in in a position to clarify the entire episode and perhaps make the issue completely academic by simply offering Ortiz his job back on condition that he clean up the bushes using a broom and shovel. This the Respondent, without explanation, declined to do. I consider that circumstance to be

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[7] Apparently Ortiz testified in English at the unemployment insurance hearing. In view of my experience with Ortiz, I am at a loss to comprehend how he could have been understood in English. Portions of the transcript of that hearing, read into the instant record, are of no significant help on the issues.

inconsistent with the Respondent's version of the event.[8]

Upon the basis of my observation of the witnesses to the incident who testified before me, I accept and credit the testimony of Kenroy Bishop, Mrs. Peters, and Ortiz as to the circumstances of Ortiz' termination, and reject that of Harold Stark and Moultrie. I deem that conclusion to be reinforced by the objective circumstances.[9]

The May 14, 1974 conversation between Fred Stark and George Peters

The facts as to this incident have been given above, pages 7 and 8. Harold Stark denies that his father made the statements attributed to him by Peters, testifying that he was there the entire time. Peters' testimony is that

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[8] At the hearing the Respondent sought to question Ortiz as to whether he wished his job back. Upon objection by the General Counsel I ruled the issue irrelevant unless the Respondent was prepared to offer Ortiz his job. The Respondent's reply was that it was not prepared to make such an offer.

[9] In attacking the credibility of Ortiz the Respondent states that Ortiz' demeanor on the witness stand discloses that when given an order to work he flies off the handle and becomes angry. This is based on an incident which occurred during the hearing. As has been related, communication with Ortiz was difficult. At one point during the hearing, when the interpreter stated that he was unable to comprehend the answer of Ortiz, Ortiz stood up, banged on the witness stand in an apparently angry manner, spoke volubly (apparently in Spanish), made a gesture, and then sat down. The interpreter was able to translate only a portion of Ortiz' statements:

> The Interpreter: Just, I go home, and I think Spanish, English, Spanish, English. That's all I could get. Interpreter, Spanish. I understand—he's saying the interpreter understands a lot of Spanish."

In my judgment this incident merely reflected the witness' frustration with his inability to communicate.

Fred Stark called him aside and spoke to him alone. Fred Stark did not testify. I have previously declined to accept Harold Stark's testimony in connection with the May 11 and the Ortiz discharges. Similarly I am unable to credit his testimony in this instance, particularly in the absence of testimony by Fred Stark. In addition, since Harold Stark's evidence in this regard was mainly negative (that is, a denial that anything occurred), I find it difficult to accept the essential premise that he would remember being on the job site at 145th St. and Jamaica Avenue on May 14, 1973 between 12 and 1 o'clock in the company of his father. Secondly, assuming that he did recall being there on that date and time, it seems even more providential that he would have been able to remember 10 months later that it was "impossible" for his father to have spoken to Peters on that occasion outside Harold Stark's hearing. Indeed, Harold Stark testified that his father did not say anything to Peters in his presence. Since Peters was the Respondent's foreman on the job, it seems implausible that there would have been no communication between Fred Stark and Peters. These circumstances thus appear to confirm my conclusion, based upon observation and demeanor, that the testimony of Harold Stark is not to be credited. I have not overlooked the fact that Peters has had two convictions for felony, pleaded guilty to a misdemeanor (assault), served time in prison, and was also found to have violated his parole. After weighing those circumstances and considering them in connection with my appraisal of the witnesses, and the entire congery of facts, I have concluded that Peters' testimony as to this incident is to be credited.

The discharge of George Peters

Here again, the testimony is solely that of George Peters against that of Harold Stark, and again we have no testimony from Fred Stark, who effectuated the discharge. On

the basis of my prior determination as to the respective credibility of the witnesses, and in the light of the entire facts of record, I accept George Peters' testimony in this instance also, and reject that of Harold Stark.

The reasons for the terminations

It has been found that the reasons ascribed by the Respondent for the terminations of the employees are not substantiated by the evidence, and in some instances conflicting. Thompson, Evans and Huff were not drunk or drinking. Maksymchak did not refuse to work. Ortiz did not refuse to clean up the dog droppings with a broom and shovel. Though originally admitting that Thompson was discharged, the Respondent now contends that he quit. And while it now asserts that Peters was discharged for lying, it gave the New York State unemployment compensation authorities a completely different explanation when Peters applied for unemployment compensation. There the Respondent stated that Peters had been discharged for misappropriation of a refrigerator and "misconduct," allegations which those authorities found unsustained.

While Evans and Huff had been previously warned about drinking on the job, and Evans given a "last chance", no such chance was given Thompson, who had never before been involved in any drinking incident. And though there is no evidence that Maksymchak had ever before given the Respondent cause for dissatisfaction, he was refused reinstatement though repeatedly requesting it. The Respondent, without explanation, declined to offer Ortiz his job back, even though it is apparent, if the Respondent's account of his termination were correct, that there could have been a misunderstanding, which, if the Respondent were acting in good faith, it should have been prepared to, and which it would have been in its interest, to dispel.

Since the reasons advanced by the Respondent for the discharges are thus untrue, what then were the real reasons?

Upon the evidence, the only reasonable conclusion left to be drawn is that the discharges were because of the employees' union activity. It has been seen that within 7 days after the Respondent learned of the Union's claim all but one of the employees who signed union cards were discharged. Apart from inference, there is specific evidence indicative of anti-union motivation. Thus we have Fred Stark's admission to Peters in the May 14 conversation that he had just fired 4 of Peters' men because they had joined the Union, and his statement to Peters in discharging him, that Peters had been told to stay away from the Union but apparently could not "learn." Maksymchak was finally told by Harold Stark that he could have his job back if he got out of the Union. Harold Stark told Kenroy Bishop that the Union was no good, would mess the place up, that all the union men except Bishop had been discharged, and that Bishop should get of the Union. In these circumstances it must be concluded that the employees were discharged because of their union activity.

The Respondent contends that it had no knowledge of the union activity, Harold Stark testifying, for example, that he was not advised by his father of the receipt of the Union's letter of May 8, until about May 13 or 14. I find the Respondent's contention incredible. There is direct evidence of the Respondent's knowledge in the evidence recited above. Moreover, I deem it implausible that Fred Stark would not have informed Harold Stark immediately of his receipt of the Union letter. It seems evident that the Respondent had sources of informtaion about employee movements. Thus, apart from the direct evidence recited heretofore, Fred Stark admittedly knew, according to

Harold Stark's account, that Peters did not go to the Veterans Administration on May 16. How he knew that is not explained. There is no evidence that Fred Stark asked Peters for an explanation. It thus seems a fair inference, as Peters testified, that Fred Stark knew, not only that Peters had not gone to the Veterans Administration, but that he had gone to the Union instead.

Whether George Peters was a supervisor

The Respondent contends that George Peters was a supervisor. The General Counsel contends the contrary. If Peters was a supervisor, his discharge would not constitute a violation of Section 8(a)(3).

Peters' job title was foreman. His job appears to be property maintenance. He was given his assignments by Fred or Harold Stark each day, and assigned a crew of two or more men, whom Peters would direct. He was not required to sign in mornings, though other employees were. He worked along with the crew. There is no evidence as to his pay.[10] He was also assigned an apartment in which to live, rent and utilities free. Since Peters' discharge the Respondent has not hired or designated a new foreman to replace him. According to Harold Stark, Harold now spends more time on the job, and less in the office, than he did previously.

Peters' employment status with the Respondent being established, the burden is on the Respondent to show supervisory status. *Local 560, Teamsters (Pennsylvania R.R. Co.)*, 127 NLRB 1327, 1330; *Local 636 Plumbers (Detroit Edison Co.)*, 123 NLRB 225, 230-231. The mere possession

[10] Harold Stark was unable to supply this information at the hearing.

of the title "foreman" does not establish supervisory authority. *Local 636, supra.* And that one is "in charge", is also not sufficient. *Local 560, supra.*

The Respondent's evidence as to Peters' supervisory status consists of testimony by Harold Stark and by employee Lawrence Moultrie. Moultrie's evidence is of little probative value. He at first testified in conclusory fashion that Peters had discharged some employees. Further examination revealed that that testimony was based on an incident in which Peters told 2 youths who would not work to "work or go home." The conclusory and unprobative character of Moultrie's testimony is evident from his testimony as to what then happened:

> The Witness: They left, they quit, he fired them.
>
> • • •
>
> The Witness: No, when I say quit, he fired them. Then they left. That is what—they quit.

Harold Stark's testimony is that Peters had authority to discharge employees. In addition he testified that Peters once fired three youths who were not working. Specifically, Stark said that 1 to 2 years before, at the end of a work day, Peters told him that the youths were fooling around and were not working and that he had discharged them.

Peters denied firing or recommending the firing of anyone. With respect to the incident concerning the three youths, Peter testified that they did not come back to work after the breaktime at 10 a.m. and that at around 10:30 he called Fred Stark on the telephone and advised him of the fact. At about 11 he again called Stark to say that the youths had not come back. Fred Stark told him that if they returned to send them to the office, which Peters did when they returned around 2 p.m. Fred Stark did

not, as we have seen, testify. I have previously credited Peters' testimony in other particulars, and discredited Harold Stark's. In this instance I accept Peters' testimony and reject that of Harold Stark.

I therefore find that the evidence does not establish that George Peters was a supervisor within the meaning of the Act.

General conclusions

On the basis of the foregoing findings I find that the Respondent discharged and failed and refused to reinstate Charles Thompson, Roger Evans, Jeffrey Maksymchak, Wayne Huff, Felipe Ortiz, and George Peters, because they had joined and assisted the Union and engaged in concerted activity for the purpose of collective bargaining and mutual aid and protection. By such conduct the Respondent violated Section 8(a)(1) and (3) of the Act.

It is further found that by interrogating and warning Bishop and Peters concerning union activity, and by telling Maksymchak that he could have his job back if he got out of the Union, the Respondent further violated Section 8(a)(1) of the Act.

IV. The Remedy

Having found that the Respondent has engaged in unfair labor practices I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It will be recommended that the Respondent offer Thompson, Evans, Maksymchak, Huff, Ortiz, and Peters, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their

seniority and other rights and privileges, and make each of them whole for any loss they may have suffered by reason of the discrimination against them. Such reinstatement shall be effected, and any backpay found to be due shall be computed, in accordance with the Board's usual policies in such cases.

Upon the foregoing findings and conclusions, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

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[11] In the event no exceptions are filed as provided by Section 102.46, of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Fred Stark, Jamaica 201 St. Corp., Inc., and Jamaica 202 St. Corp., Inc., New York, New York, their partners, officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Local 32 B, Service Employees International Union, AFL-CIO, or any other labor organization, by discharging, refusing to reinstate or to rehire, employees, or by subjecting them to demeaning conditions of employment, or otherwise discriminating against them in any manner with regard to their hire and tenure of employment or any term or condition of employment.

(b) Coercively interrogating employees concerning union activities, sympathies or membership.

(c) Threatening employees with reprisals in employment for adherence to, or support or selection of a union as a bargaining representative.

(d) In any other manner interfering with, restraining or coercing employees in the exercise of their rights to self-organization, to form, join, or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Charles Thompson, Roger Evans, Wayne Huff, Jeffrey Maksymchak, Felipe Ortiz, and George Peters, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Services.

(c) Make whole Thompson, Evans, Huff, Maksymchak, Ortiz and Peters for any loss of earnings suffered by reason of the discrimination against them.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records

necessary to analyze the amounts of backpay and the rights of reinstatement due under the terms of this Order.

(e) Post at its places of business in New York, New York, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 29 of the National Labor Relations Board, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

Dated at Washington, D.C.

CHARLES W. SCHNEIDER
Charles W. Schneider
Administrative Law Judge

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[12] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO
EMPLOYEES

(SEAL) (SEAL)

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discharge, or refuse to reinstate or rehire employees, or subject them to demeaning conditions of employment, because they join, support, assist, or affiliate with, Local 32B, Service Employees International Union, AFL-CIO, or any other union, or because they sign cards for, or otherwise designate or select such union or any other union as their bargaining representatives.

WE WILL NOT question employees about their union activity, affiliations, assistance, or support, or about their selection of the Union or any other union.

WE WILL NOT threaten employees with discharge or other reprisals in employment if they assist, support or join a union, or select a union as their bargaining representative.

WE WILL offer Charles Thompson, Roger Evans, Wayne Huff, Jeffrey Maksymchak, Felipe Ortiz, and George Peters, their jobs back and pay them for any losses sustained as a result of their discharges.

FRED STARK AND JAMAICA 201 ST. CORP., INC. AND JAMAICA 202 ST. CORP., INC.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

Decision of the Administrative Law Judge.

THIS IS AN OFFICIAL NOTICE AND MUST
NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street—4th Floor, Brooklyn, New York 11241 (Tel. No. 212-596-3535.)

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 22—September Term, 1975.

(Argued September 17, 1975 Decided November 5, 1975.)

Docket No. 74-2658

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FRED STARK and JAMAICA 201 ST. CORP., INC. and JAMAICA 202 ST. CORP., INC.,

Respondents.

Before:

FRIENDLY, TIMBERS and GURFEIN,

Circuit Judges.

Petition by the National Labor Relations Board to enforce an order, 213 NLRB No. 38, finding that respondents had violated §§ 8(a)(3) and (1) of the National Labor Relations Act by discriminatorily discharging and refusing to reinstate six employees and § 8(a)(1) by coercively interrogating and warning three employees.

Enforcement granted.

GRANT MORRIS, Esq., National Labor Relations Board, Washington, D.C. (Peter G. Nash, General Counsel; John S. Irving, Deputy

General Counsel; Patrick Hardin, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel; Allison W. Brown, Jr., Esq., National Labor Relations Board, Washington, D.C., of Counsel), *for Petitioner.*

CHARLES R. KATZ, Esq., New York, N.Y., *for Respondents.*

FRIENDLY, *Circuit Judge:*

The National Labor Relations Board seeks enforcement of an order against employers dated September 6, 1974, 213 NLRB No. 38. The employers are Fred Stark (a family partnership composed of Fred Stark, Harold Stark and Rita Stark) and two affiliated corporations, Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc., all engaged in the ownership and rental of commercial and residential buildings and properties. We shall refer to all three as "respondent." The order found that respondent had violated §§ 8(a)(3) and (1) of the National Labor Relations Act by the discriminatory discharge of, and refusal to reinstate, six employees, Charles Thompson, Roger Evans, Wayne Huff, Jeffrey Maksymchak, Felipe Ortiz and George Peters, and had violated § 8(a)(1) by the coercive interrogation and warning of Peters and another employee, Kenroy Bishop, and by offering to reinstate Maksymchak if he left his union. The order contained the usual provisions for ceasing and desisting and notice posting, and for the providing of reinstatement and back pay to the six discharged employees.

I.

The story begins with respondent's signature, on April 17, 1973, of a contract with Local 32B, Service Employees

International Union, AFL-CIO, the charging party herein (hereafter the Union), relating to a property not here involved. News of this led Peters, a foreman for respondent, to arrange for an organizational meeting in his apartment on April 30. The meeting was attended by Peters, Thompson, Evans, Huff, Maksymchak, Ortiz, and Bishop, all employed by respondent, and by a Union organizer. Each of the seven employees signed an authorization card. The Union requested recognition by letter dated May 8, which respondent received on May 10.[1]

Four of the six discharges occurred on May 11. The day began with Harold Stark's sending Thompson, Evans and Huff to remove debris from a building under renovation and haul it away. During or shortly after the lunch hour, Thompson suggested that more men were needed, the others agreed, and they drove to respondent's office to ask Harold Stark to provide them. Stark was not there and the three employees sat in the truck to await his arrival. They were joined by Maksymchak, a part-time student employee who had recently reported for work and had been told by Harold Stark's secretary, Karen Gsell, to await Stark's arrival so that he could be given his work assignment. The four moved to Maksymchak's station wagon; he announced he was not feeling well and did not think he would work that afternoon. Stark soon arrived and asked Maksymchak whether he was going to work that day. Maksymchak answered in the negative, saying that he did not feel like working. Stark thereupon discharged all four for being drunk.

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[1] Respondent claimed that it employed 18 maintenance workers during May, 1973; counsel for the Board disputed the precise number. The original charge issued against respondent alleged a violation of § 8(a)(5) as well as §§ 8(a)(3) and (1); the § 8(a)(5) charge was dismissed prior to the hearing on the basis that the Union did not represent a majority of the employees.

This was the version given, with slight variations, by the four employees, all of whom denied being drunk or, indeed, having had anything to drink. Stark testified that all but Maksymchak were drunk; that when he asked why the three had not finished the assigned job, Thompson answered that they weren't doing it and Huff that they were done with it; that he discharged the three for being drunk and not working; and that he told Maksymchak that if the latter didn't want to come to work, he was fired too.

Maksymchak further testified that on the next day he sought reinstatement; that Harold Stark asked him why he had joined the Union which was "like stabbing me in the back," and told him to wait a few weeks; and that on a later occasion Stark said he could have the job back if he got out of the Union. Stark did not specifically deny these incidents, although he made a general denial of discussing the Union with any employee.

Peters testified that on May 14 Fred Stark (Harold Stark's father) said he had just fired four of Peters' men because they had joined the Union; that Fred Stark was surprised at Peters' having joined because "you're supposed to be my foreman"; but that Stark said he would forget it, and told Peters to go back to work with a warning to "just stay away from the union." Fred Stark did not take the stand. Harold testified that he was with his father at the time of the alleged conversation and that it had not taken place; Peters, by contrast, had testified that Harold was inside a building when Fred spoke to him.

On May 15 Peters told Fred Stark he would not be in on the following day since he had been spitting blood and was going to the Veterans' Administration Hospital. According to Peters, Fred told him to stay away from the Union. In fact, Peters had had no intention of going to the hospital; instead he took Thompson, Evans, Huff and Maksymchak to the Union to make out affidavits concerning their discharge. According to Peters, Fred Stark fired

him the next morning because Peters wouldn't "learn." Again Fred did not testify but Harold, who heard the May 17 conversation, quoted his father as saying only "You are a liar and I don't trust you. You weren't at the VA Hospital when you said you were . . . You are fired."

Meanwhile, Ortiz had been discharged on May 16. Unable to speak English intelligibly and having difficulty even with an interpreter, he made the somewhat bizzare claim, corroborated, however, by two other witnesses, that Harold Stark had fired him for disobeying an order to pick up dog stools with his hands rather than get a shovel and broom. Harold Stark denied Ortiz' story; his version was that Ortiz refused to clean out litter, including the dog stools, on the ground that this was not his job.

The final episode consists of a statement allegedly made by Harold Stark to Bishop shortly after Peters' discharge on May 17. According to Bishop, Stark said that he had already fired all the other card signers and that Bishop must "give up on the union because it won't come in here." Stark did not deny this except for his general disclaimer of having discussed the Union with employees.

One other piece of evidence should be mentioned. At some date, unhappily not identified, Fred Stark called Larmond, an official of the Union, about the Union's letter demanding recognition and asked what it was "all about." Stark also inquired who had signed the cards. Larmond gave "two or three names," to which Stark replied, "Oh, I fired them. They're all drunk, and I fired them."

II.

The Administrative Law Judge (ALJ) well summarized the situation when he said:

> As is apparent from the foregoing recital, the case revolves substantially around credibility resolutions. If the substance of the General Counsel's testimony is

> accepted the complaint is substantiated. If the substance of the testimony of the Respondent is accepted the complaint falls. It seems apparent that, in a number of instances, there must be deliberate falsification of testimony by one side or the other. It is not possible that there could be honest misunderstanding with respect to some of the incidents.

In upholding his findings that the General Counsel's witnesses were credible and that Harold Stark was not, the Board followed its "established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect," citing *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enforced*, 188 F.2d 362 (3 Cir. 1951). We in turn have long been committed to the view that we will not upset a decision of the Board

> when it accepts a finding of an Examiner which is grounded upon (a) his disbelief in an orally testifying witness' testimony because of the witness' demeanor or (b) the Examiner's evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony.

N.L.R.B. v. *Dinion Coil Co.*, 201 F.2d 484, 490 (2 Cir. 1952) (Frank, *J.*) (citations omitted). Both these sound positions rest, however, on the assumption that correct procedures have been followed in making the credibility findings. Respondent contends that assumption is unwarranted here.

At the outset of the hearing respondent's counsel moved for sequestration of witnesses "because in this case there will be a very sharp issue of credibility involved"—the sequestration to include the six alleged victims of discrim-

inatory discharges. The ALJ stated he was prepared to grant the motion except for these six, since in his view "[t]he Board's uniform practice has been not to apply the rule to those persons." Respondent's counsel, stating that his real aim was to sequester the four men discharged on May 11, then rejected the ALJ's offer of sequestration-in-part.

The first credibility issue determined by the ALJ in his decision was the reason for the terminations of Thompson, Evans, Huff and Maksymchak on May 11. The issue whether three of these former employees were drunk was a sharp one, and respondent's case that this was the cause for the discharge was strengthened by the fact that the incident would seem to have preceded the telephone call in which Larmond gave "two or three names" and Fred Stark responded "[t]hey're all drunk, and I fired them." The ALJ resolved the credibility issue against respondent.

Had this been a court trial involving ordinary witnesses, it would have constituted a classic case for sequestration —a principle whose lineage is traced back to Daniel's effective cross-examination of the elders who traduced Susanna, see 6 Wigmore, Evidence § 1837 at 347-48 (3d ed. 1940), and whose high standing in the law of evidence is attested by the quaint practice of referring to it simply as "the rule." The questions for us are whether a court should require the NLRB to apply "the rule" to unfair labor practice proceedings and, if that question be answered affirmatively, what significance should be given to the fact that particular witnesses are alleged discriminatees.

III.

Section 10(b) of the National Labor Relations Act, as enacted in 1935, 49 Stat. 449, 454, provided that "the rules of evidence prevailing in courts of law or equity shall not

be controlling." The Taft-Hartley Act significantly altered this to read, 61 Stat. 136, 147 (1947):

> Any such [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States . . . .

This change reflected the same attitude that led Congress to alter the substantive standard of judicial review from the formulation of the Wagner Act, § 10(e), 49 Stat. 449, 454 (1935), "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," to that of the Taft-Hartley Act, § 10(e), 61 Stat. 136, 148 (1947), "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."[2] The § 10(b) amendment originated in the House of Representatives, and the Committee Report submitted by Representative Hartley makes clear that it was directed at what was perceived to be the same evil, and inability of the courts of appeals to require that Board determinations conform to fact, as the proposed amendments to § 10(e). H.R. Rep. No. 245, 80th Cong., 1st Sess. 40-42 (1947), *reprinted in* N.L.R.B., Legislative History of the Labor Management Relations Act, 1947, at 331-33 (1948). Although the Senate seems to have concurred in the House's amendment to

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[2] The history of these substitutive changes was authoritatively described by Mr. Justice Frankfurter in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 476-91 (1951). It is to be noted, however, that, in contract to the provision concerning judicial review, the rules of evidence provision of the Taft-Hartley Act cannot be read in tandem with the Administrative Procedure Act, which has different provisions. See 2 Davis, Administrative Law Treatise § 14.08 at 285-86 (1958).

§ 10(b) on the basis that this merely restated current Board practice—see 93 Cong. Rec. 6602 (1947) (remarks of Sen. Taft), 2 Legislative History, *supra,* at 1542—and because the phrase "so far as practicable" left the trial examiner considerable discretion—see 93 Cong. Rec. 7002 (1947) (remarks of Sen. Taft), 2 Legislative History, *supra,* at 1625—the legislative history in the House—see also H.R. Rep. No. 510, 80th Cong., 1st Sess. 53 (1947), 1 Legislative History, *supra,* at 557—amply justifies the view that § 10(b) was intended to make clear that courts of appeals have the power to review evidentiary rulings in unfair labor practice proceedings, and that it is for the judiciary to determine how closely those proceedings must conform to the procedures used in the district courts. Other courts of appeals have, without much discussion, apparently adopted this view; see, *e.g., N.L.R.B.a* v. *Capitol Fish Co.,* 294 F.2d 868, 875 (5 Cir. 1961); *General Engineering, Inc.* v. *N.L.R.B.,* 341 F.2d 367, 374 (9 Cir. 1965). Clearly "the rule," which is not an exclusionary principle, compare Davis, Administrative Law Text 271-76 (1972), but a simple and time-tested method for helping to discover the truth, would rank high in a list of evidentiary doctrines which courts, under § 10(b), should enforce upon the NLRB. The very fact that witnesses in such proceedings, as in others, will very likely have discussed their proposed testimony with counsel and among themselves heightens the importance of preserving an opportunity for the adverse party to develop inconsistencies.[2a]

[2a] The effect of failure to sequester the discriminatee witnesses was heightened by the ALJ's novel view:

> If there was fabrication, it would seem more probable that it was the one, rather than the four, who was lying. It is, of course, possible that the testimony of four can be contrived, and that of one truthful; however, the likelihood of perjury or mistake becomes more remote in direct, or even geometrical, proportion to the number of persons who testify to a fact.

Even before the tightening effected by the Taft-Hartley Act, the Board had received two judicial instructions with respect to application of "the rule." In *N.L.R.B.* v. *Quality & Service Laundry, Inc.*, 131 F.2d 182, 183 (4 Cir. 1942), *cert. denied*, 318 U.S. 775 (1943), a distinguished panel (Parker, Soper and Dobie, *CJJ.*) advised, in a per curiam opinion, that in courts of law the issue whether or not witnesses are to be separated "is a matter resting in the sound discretion of the trial court" and that the same principle "should be applied to hearings before the Board or its examiners." Shortly thereafter, Judge Florence Allen, writing in *N.L.R.B.* v. *Burke Mach. Tool Co.*, 133 F.2d 618, 621 (6 Cir. 1943), put the matter more positively:

> The breadth of the Board's power emphasizes the importance of striving for that atmosphere of perfect impartiality which is so much to be desired in any hearing to settle controversial issues. Rulings as to the reception of evidence and the general conduct of hearings should not only keep within the bounds of broad discretion necessarily imposed upon the trial examiner but also reflect an endeavor to impress the employer, as well as the employee, that every reasonable effort has been made to enable all parties to pre sent their theory of what has transpired. In the present case, the respondent seasonably moved for a separation of witnesses as soon as it appeared that the testimony of witnesses called by the Board would be inconsistent with that of Rockwell. This motion was denied and testimony of various employees who had listened to similar testimony given by others was received over respondent's objection. These rulings undoubtedly hampered effective cross-examination of the Board's witnesses by the respondent. Since the testimony presented a serious conflict on several ma-

terial points, the effect of the course adopted upon public confidence in the fairness of the proceedings was unfortunate. While we think the rulings did not constitute such an abuse of discretion as to require denial of the petition for enforcement of the order, the refusal to separate witnesses was nonetheless improvident.

In *Shartle Brothers Machine Co.*, 60 NLRB 533 (1945), the Board noted these decisions and said that while "it would have been better practice to have granted motions for the separation of witnesses," denial was not prejudicial error. This language was repeated in *The National Lime and Stone Company*, 62 NLRB 282, 284 n.5 (1945), a case which included a discriminatory discharge.

So far as we have been able to determine without the aid of adequate briefing, the *fons et origo* of the Board's doctrine that "the rule" was not to be applied to alleged discriminatees because they "were not mere witnesses at the hearing" but "in effect, they occupy the status of complainants" was *Jaques Power Saw Company*, 85 NLRB 440, 443 (1949).[3] This has been followed in a long line of cases: *Lewis Karlton*, 91 NLRB 1295 n.3 (1950); *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296 (1960), *enforced*, 291 F.2d 751 (8 Cir. 1961) (per curiam order); *Donald L. Trettenero*, 129 NLRB 610 n.1 (1960); *T.I.L. Sportswear Corp.*, 131 NLRB 176 n.1 (1961), *enforced*, 302

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[3] The Board sought to buttress its position by saying "the Respondent does not allege that [the witnesses'] testimony was improperly influenced in any way by their unrestricted presence in the hearing room, nor has the Respondent shown any substantial prejudice resulting therefrom," citing the two courts of appeals cases and its own decision in *National Lime and Stone Company*. The Board did not discuss the effect of the 1947 amendment of § 10(b).

F.2d 186 (D.C. Cir. 1962) (no discussion of sequestration); *Sopps, Inc.*, 189 NLRB 822 & n.4 (1971).[4]

In light of this substantial body of precedent, the ALJ was fully justified in saying that "[t]he Board's uniform practice has been not to apply the rule to [alleged discriminatees]." Since he clearly and correctly thought he had no discretion under Board practice, it is impossible to sustain the first position taken by Board counsel, namely, that the ALJ was exercising discretion and did not abuse it. Although the Board is on considerably stronger ground in its alternative argument that its flat rule prohibiting the sequestration of alleged discriminatees in § 8(a)(3) proceedings is sustainable, this is not ultimately persuasive.

Despite Wigmore's position that sequestration should be demandable as of right when sought in good faith, 6 Evidence § 1839 (3d ed. 1940), the principle in the federal courts prior to enactment of the Federal Rules of Evidence, 88 Stat. 1926, effective July 1, 1975, was that it was grantable in the discretion of the trial judge. See, *e.g.*, *Kaufman* v. *United States*, 163 F.2d 404, 408 (6 Cir. 1947), *cert. denied*, 333 U.S. 857 (1948); *United States* v. *Postma*, 242 F.2d 488, 494 (2 Cir.), *cert. denied*, 354 U.S. 922 (1957); *Williamson* v. *United States*, 310 F.2d 192, 198 (9 Cir. 1962); *Taylor* v. *United States*, 388 F.2d 786, 788 (9 Cir. 1967). The question of the excludability of "parties" had presented a problem, with most courts and statutes tend-

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[4] A somewhat different approach was taken in *Rickert Carbide Die, Inc.*, 126 NLRB 757 n.3 (1960). There, in sustaining refusal to sequester two discriminatees, the Board said:

> The determination whether witnesses should be excluded from a hearing is a matter within the discretion of the Trial Examiner. We find no abuse of discretion in this case especially in view of the fact that the two whom the Respondent would exclude filed the unfair labor practice charges in this proceeding. As persons filing a charge, each was a "party" within the Board's Rules and entitled to participate fully in the hearing.

ing against exclusion but with some going the other way. See 6 Wigmore, Evidence § 1841 at 364-65 (3d ed. 1940) and 1972 Pocket Supplement at 161 notes 9 and 10. Now Rule 615 has adopted Wigmore's principle of mandatory exclusion:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

but with the following equally mandatory qualification:

> This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

While, as in this case, discriminatees are not usually "parties" within NLRB Rules and Regulations, 29 CFR § 102.8 (1974),[5] since they leave the filing of a charge to their union, there is nothing to prevent their joining in such a charge and we agree with the Board that decision with respect to sequestration should not turn on whether

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[5] The term "party" as used herein shall mean the regional director in whose region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or suported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

they have done so in a particular case. On the other hand, despite the recognition accorded to charging parties in *International Union, United Automobile, etc., Workers, etc.* v. *Scofield,* 382 U.S. 205, 217-21 (1965), an unfair labor practice proceeding under § 8(a)(3) is not the exact equivalent of a private suit. The complaint is issued by the Board acting through the regional director, 29 C.F.R. § 102.15 (1974), and when he has done so "and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control." 382 U.S. at 219. In this case, as often happens, no lawyer appeared for the charging party and the proceeding was conducted solely by counsel for the General Counsel on the one hand and counsel for the respondent on the other. Under such circumstances one of the main reasons claimed for the "party" exception, the need for his presence to guide his own attorney, has diminished force. The interest of counsel for the General Counsel, like that of an Assistant United States Attorney, is—or should be—not that he "shall win a case, but that justice shall be done," *Berger* v. *United States,* 295 U.S. 78, 88 (1935). Beyond that, the judicial decisions that developed the "party" exception scarcely took into account the situation that frequently occcurs in § 8(a)(3) proceedings where several employees may be testifying to a single event on one side, whereas the other side is presented by a single witness or, if more than one, by officials or supervisory employees who are not "parties" and can thus be put under "the rule." To the contrary, it seems that in many jurisdictions which generally refused to compel sequestration of "parties," the term was given a restricted scope when the presence of the witness in question was not necessary for the effective advocacy of the cause. This was notably true in *First Nat. Bank of Mobile* v. *Lartigue,* 233 Ala. 670, 173 So. 21 (1937) (exclusion of potential distributees of an estate

remains a matter for trial court's discretion, since administrators are in charge of the suit, and, although the distributees "are said to be the parties in real interest," there was "no showing . . . of any special need of such persons to assist in the trial"). See also *Kentucky Union Lumber Co.* v. *Abney,* 17 Ky. L. Rep. 401, 31 S.W. 279 (1895) (exclusion of "chief officer of the defendant corporation in said county [where suit tried] "within discretion of trial judge, since not a "party," "nor does it appear . . . that his presence was of vital importance to a fair trial of the action"); *compare Lenoir Car Co.* v. *Smith,* 100 Tenn. 127, 42 S.W. 879 (1897) (officer of a corporation "whose presence during the trial was essential to the proper presentation of its case" entitled to remain in courtroom). Finally, the draftsmen of the Federal Rules were preparing rules for criminal as well as civil cases. In the former, in view of the Sixth Amendment, exclusion of a party would indeed "raise serious problems of confrontation and due process," as stated in the Advisory Committee's Note to Rule 615.[6] In contrast, if enforcement of § 8(a)(3) were to take place through a Government suit in a district court, we fail to see how any constitutional problem would be created by applying "the rule" to discriminatees, at least to the limited extent of excluding them during the testimony given by fellow discriminatees concerning a single event.

However, we need not decide whether, if somehow an analogous situation were to arise in a district court, witnesses occupying a position similar to discriminatees in § 8(a)(3) proceedings would be immune from sequestration because of the second sentence of Rule 615. Under the direction in § 10(b) that the rules of evidence applicable in the district courts shall be applied only "so far as prac-

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[6] Such exclusion is, of course, prohibited by F.R.Cr.P. 43.

ticable," the conduct of unfair labor practice proceedings would not have to conform precisely to the second sentence of Rule 615—even if the Federal Rules of Evidence had been in effect when this hearing was held—so long as there is substantial reason for fashioning a different rule. The considerations so well stated by Judge Allen in *N.L.R.B.* v. *Burke Mach. Tool Co., supra,* 133 F.2d at 621, dictate some application of "the rule" in Labor Board hearings even when the witnesses are alleged discriminatees. Exclusion of discriminatees for a portion of the hearing, even if it were to be assumed that, because of Rule 615, persons similarly situated could not now be excluded in a similar type of action in a district court—an assumption which may or may not be valid—would be a small price for them to pay for the General Counsel's prosecuting the complaint on their behalf. Weighing the relative importance of the presence of a discriminatee at every moment of the trial to the zealous advocacy of his cause against the danger that his financial interest makes the temptation to perjury great, and considering the imbalance from failure to apply "the rule" to discriminatees while it would generally be applicable against the employer, we think that the ALJ should have authority to apply "the rule" to discriminatees and that, where several discriminatees are to be called as witnesses to the same incident, the presumption in favor of sequestration during such testimony could be rebutted, if at all, only by a particularized showing of need for the discriminatees to hear each other's evidence—a showing we find extremely hard to visualize. We hold, therefore, that the ALJ should have had authority to sequester the four employee witnesses during their respective testimony to the May 11 events, and that, under the rather typical facts here presented, failure to have exercised that discretion in favor of sequestration would have been an abuse of discretion.

IV.

However, our holding on this point does not lead automatically to a remand—much less to the denial of enforcement sought by respondent. *Cf. N.L.R.B.* v. *Quality & Service Laundry, supra.* Apart from the repetitive testimony of these four witnesses, the ALJ had extremely solid ground for his credibility findings. Even as to the May 11 incident, the testimony of the four discriminatees found support in that of the two office workers called by respondent, one of whom denied that there were any signs in the car that the men had been drinking and the other of whom was asked no questions on the subject although she had observed Thompson on the afternoon at issue. In addition, although the ALJ used his findings that Harold Stark had lied about the May 11 incident to discredit some of Stark's other testimony, he could equally well have found that flaws in other testimony discredited that in regard to May 11. We refer particularly to Harold Stark's failure to make specific denials of Maksymchak's testimony of what occurred on May 12 when Maksymchak sought reinstatement, and of Bishop's testimony concerning the conversation on May 17, and to the failure to call Fred Stark, who was present in the hearing room, to answer Peters' version of the incident of May 14 particularly after Peters had asserted that Harold could not have heard them, and to repudiate Peters' version of Fred Stark's statements of May 15 and May 17. In the absence of any explanation it would be hard to think of a stronger case for drawing an adverse inference from failure to call a witness under a party's control. 2 Wigmore, Evidence §§ 285-86 (3d ed. 1940). Added to all this is the fact that six of the seven union adherents were discharged, and the seventh threatened, within a week of their signing the cards. It would tax credulity to the breaking point

to assume that this was mere coincidence bereft of any casual connection.[7]

V.

The only other point requiring discussion is respondent's contention that Peters was a supervisor within § 2(11) and thus not an "employee," § 2(3), protected by §§ 8(a)(1) and (3). No useful purpose would be served by detailing the evidence. It suffices to say that this created a close question of fact whether Peters was "merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management," *N.L.R.B.* v. *Southern Bleachery & Print Works,* 257 F.2d 235, 239, (4 Cir. 1958), *cert. denied,* 359 U.S. 911 (1959). It is settled law that the Board's determination of this question receives even more than usual weight. As Judge Waterman said for us in *N.L.R.B.* v. *Metropolitan Life Ins. Co.,* 405 F.2d 1169, 1172 (2 Cir. 1968):

> Inasmuch as infinite variations and gradations of authority can exist . . . and any drawing of the line between the personnel of management and the rank and file workers may require some expertise in evaluating actual power distributions which exist within an enterprise, the Board's findings relative thereto are entitled to great weight.

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[7] Respondent claims that the record fails to show that it knew of the employees' union activities at the time they were fired, and that, lacking such proof, the order cannnot stand; apparently the claim is that the employer's knowledge must be directly proven. The law is clear that such direct evidence need not be introduced, and that the employer's knowledge can be inferred from the circumstances. *N.L.R.B.* v. *Link-Belt Co.,* 311 U.S. 584, 602 (1941); *Amalgamated Clothing Workers* v. *N.L.R.B.,* 302 F.2d 186, 190 (D.C. Cir. 1962).

See *accord, Amalgamated Local Union 355* v. *N.L.R.B.*, 481 F.2d 996, 999-1000 (2 Cir. 1973) (Davis, *J.*); *Oil, Chemical and Atomic Workers Int. U.* v. *N.L.R.B.*, 445 F.2d 237, 241 (D.C. Cir. 1971) (McGowan, *J.*).

Enforcement granted.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2658

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FRED STARK AND JAMAICA 201 ST. CORP., INC. AND JAMAICA 202 ST. CORP., INC.,

Respondents.

Before: FRIENDLY, TIMBERS and GURFEIN, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondents, Fred Stark and Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc., New York, New York, their partners, officers, agents, successors, and assigns, on September 6, 1947. The Court heard argument of respective counsel on September 17, 1975, and has considered the briefs and transcript of record filed in this cause. On November 5, 1975, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondents, Fred Stark and Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp.,

Inc., New York, New York, their partners, officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against Respondents.

HENRY FRIENDLY
Judge, United States Court of Appeals for the Second Circuit

WM. H. TIMBERS
Judge, United States Court of Appeals for the Second Circuit

FILED: December 2, 1975